Nos 300 & 304

Supreme Court of the United States

OCTOBER TERM—1943.

ADOLF AXELRATH,

Petitioner,

against

SPENCER KELLOGG AND SONS, INC.,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

SYDNEY J. SCHWARTZ,
HOWARD F. R. MULLIGAN,
Counsel for Petitioner.

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PETITION FOR CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the petitioner, ADOLF AXELRATH, and respectfully petitions this Court for writs of certiorari to review the final judgments of the Court of Appeals of the State of New York entered in this matter on May 27, 1943 (R. 83, 84) (290 N. Y. Memo. 223) one of which (R. 83) affirmed with costs a final judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the office of the Clerk of Nassau County on December 9, 1942 (R. 80), which in turn affirmed a judgment of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on April 9, 1942 (R. 5-6), dismissing the complaint (R. 36-8) of petitioner against respondent to recover damages in the amount of Twenty Thousand ($20,000) Dollars with interest. The other judgment of the Court of Appeals sought to be reviewed (R. 84) affirmed an order of the said Appellate Division

entered on November 23, 1942 (R. 79), which in turn affirmed an order of the Special Term of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on February 14, 1942 (R. 8), denying petitioner's motion for summary judgment for the relief demanded in the complaint, and made answer in the affirmative to a question certified to the said Court of Appeals by the said Appellate Division, to wit: "Was the order of the Special Term denying plaintiff's motion for summary judgment properly made?"

Summary and Short Statement of the Matter Involved.

The facts involved in this case are not in dispute. The issue is whether an ordinary commercial contract for the sale of a vessel to an alien, subject to the approval of the Maritime Commission at any time prior to delivery which approval the seller undertakes to obtain, the contract being by its specific terms assignable, is a valid binding agreement which may be assigned prior to the expiration of the time for delivery to a citizen, so as to subject the seller to the duty of performance upon proper tender by the assignee as to whom no approval by the Maritime Commission is required. The holding of the Courts below is that such an agreement is a nullity under the provisions of the Shipping Act, and places no obligation of performance upon the seller, upon such tender.

The issue of law presented was raised by motions for summary judgment by petitioner for the relief demanded in the complaint (R. 9) and by respondent for dismissal of the complaint (R. 67) upon affidavits pursuant to Rule 113 of the Rules of Civil Practice of the State of New York under which the Court may grant judgment where no triable issue of fact exists. The action was brought by petitioner, as assignee of one GEORGE P. FERGUSON, to recover Twenty Thousand ($20,000) Dollars as broker's commissions for services rendered by Ferguson in obtain-

ing a purchaser ready, willing and able to purchase the tank vessel "Spencer Kellogg" owned by the respondent which the respondent offered for sale through Ferguson.

Ferguson was employed under a written contract in the form of a letter dated September 3, 1940, signed by the respondent containing the following paragraph (R. 14):

> "If and when the sale is effected approval of the Maritime Commission obtained, full payment is made to us and title transferred to your buyers, then you will be paid a commission of 5% of the purchase price. Otherwise, there is no obligation on our part."

On October 24, 1940, a written contract of sale (R. 15-21) was entered into between respondent and LLOYD BRASILEIRO, a Department of the Republic of Brazil, whereby respondent agreed to sell the said tank vessel to Lloyd Brasileiro for the purchase price of Four Hundred Thousand ($400,000) Dollars, of which One Hundred Thousand ($100,000) Dollars was paid upon the signing and delivery of said contract, One Hundred Thousand ($100,000) Dollars was to be paid upon the delivery of the vessel and the balance of Two Hundred Thousand ($200,000) Dollars was to be paid in sixteen (16) equal monthly instalments with interest at 5% per annum. The contract provided in paragraph 10 thereof, among other things, as follows (R. 19):

> "This agreement and the sale of the vessel are subject in all respects to the condition that the United States Maritime Commission shall approve the sale of the vessel to the buyer and her transfer to Brazilian registry on or before the date of delivery of the vessel, to wit: upon completion of her present commitments and between December 1st and December 15th, 1940, without any condition imposed on either the Buyer or the Seller than the usual conditions that the vessel shall be free of liens and encumbrances at the time of the sale and without restrictions therein of cargo and trading privileges to and from the United

States. The Seller shall promptly apply for such approval by the United States Maritime Commission and use all diligence to obtain same, and the Buyer shall promptly do whatever the Seller may reasonably request in obtaining such approval."

The contract, by its terms, was assignable (paragraph 13, R. 20).

Respondent applied to the Maritime Commission for approval of the proposed sale of the vessel to Lloyd Brasileiro as required by Section 9 of the Shipping Act of 1916 as amended (U. S. C. Title 46, Section 808, 52 Stat. 964), the application bearing even date with the contract and having been signed by respondent as owner and Lloyd Brasileiro as the proposed vendee (R. 52-9). On December 6, 1940, the Maritime Commission denied approval of the sale and transfer of the vessel to Brazilian registry (R. 60). On December 9, 1940, respondent wrote Lloyd Brasileiro notifying it of such denial, purportedly cancelling the contract and enclosing a check for refund of the down payment of One Hundred Thousand ($100,000) Dollars (R. 61). On December 10, 1940, Lloyd Brasilerio, through its counsel, acknowledged receipt of the letter of December 9, 1940, requested information as to the grounds for the Maritime Commission's action and as to the chronology of the proceedings, and rejected the concellation of the contract inasmuch as the time for delivery had not expired and returned the check for One Hundred Thonsand ($100,000) Dollars (R. 62-3).

On December 13th respondent again forwarded the check for One Hundred Thousand ($100,000) Dollars to Lloyd Brasileiro and stated that in respondent's view the contract had been cancelled and refused to do anything further to obtain approval or to furnish the information requested by Lloyd Brasileiro (R. 64). On December 14, 1940, Lloyd Brasileiro assigned all of its right, title and interest in the contract to Moore-McCormack Lines, Inc., a

Deleware corporation (R. 22-4), and on December 16, 1940, Lloyd Brasileiro gave notice of said assignment to respondent, returning with such notice the check for One Hundred Thousand ($100,000) Dollars and refusing to recognize respondent's declaration of the cancellation of the contract (R. 25). December 15, 1940, the last day for performance under the contract, was a Sunday and it is admitted by the pleadings below that the last day for performance accordingly fell on the following day, December 16, 1940 (R. 37, 39). On December 16, 1940, Moore-McCormack Lines, Inc., tendered performance of the contract to respondent and offered to pay the full balance of the purchase price in cash on delivery or at the preference of respondent to furnish notes in accordance with the terms of the contract secured by a letter of credit of the Chase National Bank of the City of New York in respondent's favor (R. 26). Respondent refused to make delivery writing in a letter of December 17th that inasmuch as the Maritime Commission under date of December 6th had denied approval of the sale the contract on that day became null and void and respondent under such conditions refused to recognize the assignment (R. 27-8). Further correspondence between the parties followed in which their positions were reiterated (R. 30-34, 65-6). Respondent thereafter, on due demand, refused to make payment of broker's commissions (R. 38, 39) contending that under Section 9 of the Shipping Act of 1916 as amended by the Act of June 23, 1938 (Title 46, Section 808 of the U. S. C. A.) it was unlawful to sell the vessel without the approval of the Maritime Commission and that upon the denial of approval, the contract was at an end by virtue of the provisions of the statute (R. 40-3).

The Statute (52 Stat. 964) (set out in the appendix) requires approval of the Maritime Commission of any sale of a vessel by a citizen of the United States to an alien or to the transfer to foreign registry of any such

vessel. It requires no approval of the sale of any vessel to an American national where no change to foreign registry is requested. The statute further empowers the Commission to reconsider its orders and to amend, reverse or modify them (Title 46, U. S. C. Section 824, 39 Stat. 736).

In petitioner's view, a contract to sell a vessel of American registry to an alien, expressly subject to approval by the Maritime Commission is a valid commercial agreement imposing mutual obligations of performance on the contracting parties particularly where, as here, the seller expressly undertook to exert all diligence in obtaining such approval and the buyer agreed to do whatever the seller might reasonably request to obtain such approval (R. 19). Such a commercial obligation may be assigned, where, as here, the contract is by its specific terms assignable (R. 20). And where, as here, the contract is assigned prior to default on the part of the buyer, and before the expiration of the time for performance, and while the Maritime Commission still has power to give its approval on rehearing, a duty is imposed on the seller to perform in relation to the assignee. Where, as here, the assignee is an American corporation, requiring no approval of the Maritime Commission to the transfer of the vessel, the duty of performance by the buyer is absolute upon tender of performance by the assignee. In the words of the dissenting opinion of Mr. Justice (now Presiding Justice) Close of the Appellate Division (R. 81):

> "The contract was assigned prior to the law day to a purchaser to whom the condition precedent had no application."

The New York Supreme Court upon denying petitioner's motion for summary judgment at Special Term stated (R. 74):

> "The defendant's argument on this motion is that there was no contract without the Commission's ap-

proval and if there was no contract that there could be no assignment. With this contention, I agree."

This is the kernel of the controversy which can be resolved only by the construction to be given to the Shipping Act. Petitioner contends that having obtained a purchaser, to wit: Moore-McCormack Lines, Inc., a Delaware corporation, not an alien, to which the prohibition of the Shipping Act did not apply, which said purchaser was ready, willing and able to take delivery of the vessel and to make payment therefor in accordance with the terms of the contract, and within the period prescribed in the contract for performance, he has earned the brokerage commissions agreed by respondent to be paid; and that all of the conditions of said agreement have been met except such as were not performed because of respondent's wilful default and refusal to deliver to Moore-McCormack Lines, Inc.

Jurisdiction.

Jurisdiction to grant the writs prayed for by this petition is found in Section 237 (b) of the Judicial Code (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937) inasmuch as the question presented involves a right, privilege and immunity set up and claimed by the respondent under a statute of the United States, to wit: Section 9 of the Shipping Act of 1916 as amended by the Act of June 23, 1938 (Title 46, U. S. C. Section 808, 52 Stat. 964). If the construction of the Shipping Act arrived at by the Courts below is sustained the judgments sought to be reviewed were properly made. On the other hand, if the construction placed upon the Shipping Act by the Courts below is not sustained and the construction of that statute contended for by petitioner is adopted, the judgments sought to be reviewed were error in that the contract upon which petitioner seeks

recovery was fully performed by petitioner's assignor and performance of the condition of obtaining approval of the Maritime Commission to the sale of the vessel to Lloyd Brasileiro was excused upon the assignment of the contract to Moore-McCormack Lines, Inc. which required no approval of the Maritime Commission to purchase the vessel and take delivery thereof.

The questions involved are substantial in that if petitioner's construction of the Statute is adopted petitioner will become entitled to judgment against respondent in the amount of $20,000 with interest and costs, whereas if the construction of the Courts below embodied in the judgments sought to be reviewed is adopted petitioner will not become entitled to such judgment.

The Federal question raised in this matter and sought to be presented to this Court for review was first raised by the pleading in the defendant's answer of a so-called "first, separate and complete defense" (R. 40-3) in which the full portion of the Shipping Act, the construction of which is in issue, was quoted (R. 41-2). Respondent in said defense further pleaded that pursuant to the provisions of the said statute and of the contract, application was made to the Maritime Commission for approval of the sale of the "Spencer Kellogg" to Lloyd Brasileiro, permission was refused and upon the refusal of such permission the contract of sale was at an end (R. 42-3). Concluding said defense is the further allegation of paragraph Eighth of said defense as follows (R. 43):

> "EIGHTH: The contract having been terminated by reason of the disapproval of the sale by the United States Maritime Commission and the agreement for the payment of commission to said George P. Ferguson having expressly provided that he was not to receive a commission until sale was effected and title passed, which did not occur, no commission was earned by said George P. Ferguson and there is nothing due and owing from the defendant to said George P. Ferguson."

The Federal question was passed on by the Justice at Special Term in his opinion as follows (R. 74-5):

> "The defendant's argument on this motion is that there was no contract without the Commission's approval and if there was no contract that there could be no assignment. With this contention, I agree. By Section 808, Title 46, of the U. S. Code Annotated, it is provided, in part:
>
> '* * * it shall be unlawful without the approval of the United States Maritime Commission, to sell * * * or agree to sell * * * to any person not a citizen of the United States * * * any vessel * * * owned in whole or in part by a citizen of the United States * * *.'
>
> Violations, according to that Section, will result not alone in the forfeiture of the vessel but in punishment of the violator by the imposition of a fine of $5,000, imprisonment of not more than five years, or both.
>
> The parties to the contemplated sale in this case apparently recognized Section 808 by conditioning their agreement upon the Commission's approval. Had they not done so, the agreement would have been void and unenforceable. Nevertheless, for it is well settled that a contract or sale directly prohibited by statute is void. (Sturm v. Truby, 245 App. Div. 357; Restatement of the Law of Contracts, Section 580; Williston on Contracts, Revised Edition, Section 1763.) But, having expressly agreed to the condition, the conclusion that the contract was ineffective is strengthened and reinforced, for a precedent condition must be performed or happen before a duty of performance arises or before the agreement of the parties in this case became a valid and binding contract. (See Williston on Contracts, Revised Edition, Section 666-A.) 'Non-performance of a condition precedent must * * * annul the contract in toto * * *' (Del Monte Dress Co., Inc. v. Royal Indemnity Co., 154 Misc. 751). After the defendant's application for approval was denied, it was under no obligation to apply again. It rightfully treated the

contract as non-existent and returned the down payment. Ferguson, therefore, had not earned any commission."

The question was raised in the Appellate Division by notice of appeal from the orders of the Special Term and the judgment of the Special Term dismissing the complaint which said notices of appeal specified that the appeals were taken from each and every part of said judgment and orders as well as the whole of each thereof (R. 2-4). It is not the practice in the State of New York to file assignments of error or to petition for allowance of appeal. An appeal is taken by the service and filing of a notice of appeal specifying the order or judgment appealed from or the particular portions thereof sought to be reviewed if the entire judgment record is not brought up for review. Upon such appeal the entire judgment or order is brought up for review unles the notice of appeal limits the appeal to a specific part thereof (Civil Practice Act Section 562). The question was raised on appeal to the Court of Appeals by specification in the notice of appeal to that Court that appeal was taken from so much of the order of the Appellate Division entered November 23, 1942, pursuant to leave granted by said Appellate Division, as affirmed the order of the Special Term of the Supreme Court denying plaintiff's motion for summary judgment for the relief demanded in the complaint (R. 78) and that the appeal was further taken from each and every part of the judgment of affirmance of the said Appellate Division entered in the office of the Clerk of the County of Nassau on April 9, 1942 (R. 80). The question was briefed in the briefs of both petitioner and respondent submitted to the Appellate Division and to the Court of Appeals as is quite evident from the reports of the decisions of those Courts (290 N. Y. Memo 223; 265 App. Div. 874). Appended hereto is a complete copy of the opinion of the Special Term of the Supreme Court denying petitioner's motion for summary judg-

ment for the relief demanded in the complaint and a copy of the dissenting opinion of Mr. Justice (now presiding Justice) Frederick P. Close of the Appellate Division.

The Questions Presented.

The record presents the following Federal questions:

1. Is a contract to sell a vessel by an American citizen to an alien valid under the Shipping Act so that it may be assigned to a citizen of the United States prior to the expiration of the time for performance to vest in the assignee the right of tendering payment and demanding performance from the seller, where the contract by its express terms is subject to the approval of the Maritime Commission and is assignable and no violation of law is contemplated or necessarily incident to performance?

2. Did the rights and liabilities under the contract of sale survive denial of approval of the sale of the vessel to a foreign national so that it continued to be a valid subsisting and assignable obligation where rehearing before the Maritime Commission of the application for approval might have been applied for within the time for performance prescribed by the contract and the Commission's objections satisfied, where, as in the case at bar, the seller expressly undertook to exercise all diligence to obtain such approval and the buyer undertook to do whatever the seller might reasonably request to obtain such approval.

3. Was the agreement of sale whereunder the seller undertook to exercise all diligence to obtain the approval of the Maritime Commission and the buyer undertook to do whatever the seller might reasonably request to obtain such approval, a valid undertaking by the seller to exercise all diligence to obtain such approval, which obligation

subsisted so long as such approval might be obtained by initial application, rehearing or otherwise during the period for performance prescribed by the contract; and, if so, was this obligation assignable prior to the expiration of the time for performance so as to require performance of the seller upon demand and tender of performance by the assignee in accordance with the terms of the contract.

Reasons Relied on for the Allowance of the Writs.

The reasons relied on by petitioner for the allowance of the writs of certiorari herein prayed for are that of the Court of Appeals of the State of New York by the judgments sought to be reviewed, has decided a Federal question of substance not heretofore determined by this Court. Careful examination of the reported authorities by counsel for petitioner has disclosed only one case decided in a Federal Court construing the Shipping Act insofar as it is involved in the issue presented in this case. That was a decision of the United States District Court, District of Maine, S. D., reported under the name of The Pilot, 42 Fed. (2d), 290, which case was not appealed to the Circuit Court or to this Court. In that case a libel had been brought against the vessel for violation of the Shipping Act in "selling the boat to a person not a citizen of the United States without first obtaining the approval of the Shipping Board". The proceeding was brought to declare a forfeiture of the vessel under the Act which provides for such forfeiture in the event of violation. The Court dismissed the libel, stating at page 290:

> "There was evidently time at Lubec to obtain permission of the Board before the actual sale was effected, and no sale could be completed until an actual delivery of the boat. I think the claimant clearly had an opportunity to get the Board's permission before the boat left American waters."

No other Federal case has been disclosed by the research of petitioner's counsel nor has any Federal case construing the Act been cited in any of the briefs of respondent's counsel below or in the opinion of the Special Term which is the only opinion handed down by the Courts below in support of the judgments. Respondent's counsel did cite in its brief to the Court of Appeals, the case of *Keeveny* v. *Charles R. McCormick & Co.*, 266 Fed. 314 (C. C. A. 2), in which suit was brought on a first cause of action to recover a brokerage commission in connection with a contract for the sale of a vessel requiring the approval of the then United States Shipping Board where the contract itself does not appear to have been assignable and made no mention of the fact that it was subject to the approval of the Shipping Board and where the Shipping Board refused to permit the sale and nothing was thereafter done to tender performance by the purchaser or by any assignee of the purchaser who could perform without consent of the Shipping Board. In other words, in that case the contract of sale simply could not be performed in any legal manner whereas in the case at bar the contract could have been performed legally and would have been performed except for respondent's refusal to accept the tender of performance by the assignee, Moore-McCormack Lines, Inc.

The issue involved in the case at bar, which is sought to be subjected to the review of this court, is one that has become of greater significance in recent years with the multiplication of administrative boards exercising supervisory powers over the transaction of ordinary commercial business affairs which, due to the complexity of our present economic system, are vested with a public interest. This case does not present the question of the power of the Congress or the prudence of Congress in creating such Commissions and vesting in them the supervisory power referred to. There is not the slightest

doubt that the power exists and that its exercise is necessary to the well-ordered conduct of the particular fields of interstate commerce over which the various Commissions have been charged with supervision. The question posed, however, is the very important one of whether the requirement of the approval of such Federal Commissions to the performance of the various acts which are prohibited in the absence of such approval, has created a legal situation whereby businessmen in the ordinary transaction of commerce cannot, however much they will it, enter into a binding commercial contract, to obtain such approval, and subject to obtaining such approval or the elimination of the need therefore (as in the case at bar), to perform an ordinary commercial transaction. Put another way, the question is whether business men can make binding agreements to abide by Federal laws requiring approval by Commissions of certain types of commercial transactions, and are they subject to the usual obligations of breach of contract where they fail to perform, where performance contemplates and requires no violation of law.

Typical, but by no means exclusive, of the Acts requiring the consent of Federal administrative boards to the performance of ordinary commercial contracts are the following:

> The Act prohibiting the issuing by any carrier of securities without prior authority by order of the Interstate Commerce Commission (Title 49, U. S. C. Section 20 (a) (2); Feb. 28, 1920, c. 91, Section 439, 41 Stat. 494).
>
> The Act prohibiting the interstate or foreign operation of motor carriers unless a certificate of public convenience and necessity be issued by the Interstate Commerce Commission (Title 49, U. S. C. Section 306(a) Feb. 4, 1887, c. 104, Part II, § 206 as added Aug. 9, 1935, c. 498, 49 Stat. 551 and amended June 29, 1938, c. 811 § 8, 52 Stat. 1238, Sept. 18, 1940, c. 722, Title I § 20(e), 54 Stat. 923).

The Act prohibiting the operation in interstate or foreign commerce of contract carriers by motor vehicle unless there is in force a permit issued by the Interstate Commerce Commission (Title 49, U. S. C. Sec. 309(a) Feb. 4, 1887, c. 104, Part II, § 209, as added Aug. 9, 1935, c. 498, 49 Stat. 552 and amended June 29, 1938, c. 811, § 9, 52 Stat. 1238, Sept. 18, 1940, c. 722, Title I, § 16, 54 Stat. 919).

The Act prohibiting air transportation by carriers in the absence of a certificate of public conveyance and necessity issued by the Civil Aeronautics Board (Title 49 U. S. C., Section 481(a), June 23, 1938, c. 601 § 401, 52 Stat. 987; Reorg. Plan No. IV § 7 eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235).

The Act prohibiting the operation in interstate or foreign commerce of common carriers by water in the absence of the issuance of a certificate of public convenience and necessity by the Interstate Commerce Commission (Title 49, U. S. C. Section 909(a), Feb. 4, 1887, c. 104 Part III § 309, added Sept. 18, 1940, c. 722, Title II § 201, 54 Stat. 941).

The Act prohibiting the operation in interstate or foreign commerce of freight forwarders in the absence of the issuance of permits by the Interstate Commerce Commission (Title 49, U. S. C. Section 1010(a), Feb. 4, 1887, c. 104, Part IV § 410, as added May 16, 1942, c. 318, § 1, 56 Stat. 291).

The Act prohibiting the use or operation of radio apparatus except under license of the Federal Communications Commission (Title 47, U. S. C. Section 301, June 19, 1934, c. 652 § 301, 48 Stat. 1081).

The Act prohibiting the use of the mails or of instruments of transportation or communication in interstate commerce for the sale or offer to buy any unregistered security where registration is required (Title 15, U. S. C. Section 77(e) May 27, 1933, c. 38, Title I § 5, 48 Stat. 77; June 6, 1943, c. 404 § 204, 48 Stat. 906).

In all of these cases it is obvious that businessmen in good faith enter into contracts to engage in one or more of the prohibited acts subject, of course, to the approval of the Commission having supervisory jurisdiction. In

the making of such contracts there is often, if not invariably, included an undertaking on the part of one or more of the contracting parties to exercise diligence in making the necessary efforts to obtain such approval. According to the theory and principle evolved in this case by the Courts below such agreements are worthless scraps of paper imposing no duty of performance nor any legal obligation upon any of the contracting parties to perform in any respect whatever. Paraphrasing the summary of respondent's argument, included and approved in the opinion of the Special Term (R. 74) "There is no contract without the Commission's approval". The Court below said without a contract there could be no assignment. It is not a step further to point out that without a contract there could be no obligation to perform, even to the extent of applying for permission. If this is the law and the proper construction to be placed upon Federal statutes of general application and of daily increasing importance by reason of the vast field of commerce involved, it is submitted that such construction should have the approval of an authoritative decision of this Court. It is difficult to believe that this Court would sanction such a construction of a Federal statute, the effect of which would be to foster complete irresponsibility and lawlessness in commercial obligations requiring approval by Federal Commissions.

Under these circumstances it seems that this case presents a question decided by the highest Court of the State of New York in a way greatly restricting the freedom of interstate commerce. In the absence of a decision by this Court covering the principle involved, it is submitted that certiorari to review should be granted.

Conclusion.

WHEREFORE, petitioner prays that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York commanding that Court to certify and to send to this Court on a designated day for its review and determination a full and complete transcript of the record and all proceedings in the action entitled "Adolf Axelrath, plaintiff-appellant, against Spencer Kellogg and Sons, Inc., defendant-respondent", Calendar #100, April 1943 Term, and that said judgments of the Court of Appeals of the State of New York and the said judgment and order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, and the said judgment and orders of the Special Term of the Supreme Court of the State of New York, County of Nassau, may be reversed by this Honorable Court and that petitioner may have judgment for the relief demanded in the complaint and for such other and further relief as in the premises may be meet and proper.

Dated, New York, August 20, 1943.

ADOLF AXELRATH,
Plaintiff-Appellant.

By SYDNEY J. SCHWARTZ and
HOWARD F. R. MULLIGAN,
Counsel.

Supreme Court of the United States

OCTOBER TERM—1943.

ADOLF AXELRATH,

Petitioner,

against

SPENCER KELLOGG AND SONS, INC.,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI

Opinions Below

The opinion of the Special Term (R. 73) has not been officially reported but has been unofficially reported at 33 N. Y. Supp. (2d) 94. No opinion for affirmance was rendered by the majority of the Appellate Division. The dissenting memorandum of Mr. Justice (now Presiding Justice) Close (R. 81) is reported at 265 App. Div. 874. No opinion was handed down by the Court of Appeals on affirmance but a report of its decision appears at 290 N. Y. memo. 223.

Jurisdiction

Jurisdiction of this Court is invoked upon the ground that the question presented involves a right, privilege and immunity set up and claimed by the respondent under a

Statute of the United States, to wit: Section 9 of the Shipping Act of 1916, as amended by the Act of June 23, 1938 (Title 46, U. S. C. Section 808, 52 Stat. 964). This Court's authority to grant the writs prayed for by the foregoing petition is found in Section 237(b) of the Judicial Code (Act of February 13, 1935, c. 229, Section 1, 43 Stat. 937). A discussion of the substantial nature of the question involved appears above in the petition under the heading "Jurisdiction" (p. 7) to which there is no occasion to add anything at this point. See also the discussion, *supra,* under the heading: "Reasons relied on for the allowance of the writ" (pp. 12-16).

Statement of the Case

A statement of the case is contained in the petition for certiorari *supra* (p. 2) under the heading "Summary and Short Statement of the Matter Involved" which will not be here repeated.

Specification of Errors

As pointed out in the petition for certiorari (*supra,* p. 10) it is not the practice in the State of New York to assign errors upon the taking of an appeal, inasmuch as the notice of appeal brings up for review the entire judgment or order appealed from unless the notice of appeal itself specifically limits its scope to a part of the judgment or order appealed from, which is not the situation in the case at Bar (R. 2-4, 78).

We have in the petition for certiorari specified the questions presented for review to this Court (*supra,* p. 11). The Court of Appeals specifically committed error as follows:

1. In failing to hold that a contract to sell a vessel by an American citizen to an alien which prior to the

expiration of the time for performance was assigned to a citizen of the United States, was a valid and binding contract so that upon tender of performance by the assignee and refusal to deliver by respondent, respondent was in default by reason of which it excused and rendered unnecessary the performance by petitioner's assignor of the conditions of the brokerage agreement requiring approval of the Maritime Commission transfer of title and full payment to be made to the respondent.

2. In failing to hold that the tender of performance by Moore-McCormack Lines, Inc., was a valid tender of performance of the contract of sale and that upon such tender and refusal by respondent, petitioner's assignor had earned his commissions as broker.

3. In affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the office of the Clerk of Nassau County on December 9, 1942 (R. 80), and the order of said Appellate Division entered November 23, 1942 (R. 79) which in turn affirmed the judgment of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on April 9, 1942 (R. 5) and the order of the Special Term of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on March 20, 1942 (R. 6) dismissing plaintiff's complaint and the order of the Special Term of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on February 14, 1942 (R. 8) denying plaintiff's motion for summary judgment and for the relief demanded in the complaint.

4. In failing to reverse the above mentioned judgment and order of the said Appellate Division and the judgment and orders of the Supreme Court and to grant plaintiff's motion for summary judgment for the relief demanded in the complaint.

Summary of Argument

The contract of sale between respondent and Lloyd Brasileiro was a valid and binding agreement from the time of its execution notwithstanding the absence of approval by the Maritime Commission. The contract, by its express terms assignable, was validly assigned by Lloyd Brasileiro to Moore-McCormack Lines, Inc., prior to the expiration of the time for performance under the terms of the contract. The tender of performance by Moore-McCormack Lines, Inc. prior to the expiration of the time for performance was valid and placed respondent in default when respondent refused to accept such tender and to make delivery of the vessel. Upon such default, petitioner's assignor was excused from the conditions of the brokerage agreement requiring transfer of title and full payment to be made for the vessel before payment of the brokerage commission. The condition of the brokerage agreement requiring the approval of the Maritime Commission was excused by the assignment of the contract to a purchaser, Moore-McCormack Lines, Inc., prior to the law date to whom such condition had no application. Plaintiff having performed all of the conditions of the brokerage agreement except such as were excused by the assignment to Moore-McCormack Lines, Inc., and by respondent's default he has earned his brokerage commissions and was entitled to judgment for the relief demanded in the complaint.

Argument

In approaching the discussion of the issue of law, it might be well to point out that certain basic principles of brokerage law of the State of New York, applicable to this case, are established beyond dispute and are not in controversy here. This case can be decided only by the determination of the Federal questions involved which

have been delineated in the petition for certiorari (*supra*, p. 11), since the determination of the Federal questions will automatically decide which of the indisputable principles of state law are to apply to the facts involved.

First, petitioner readily concedes that it is an elementary principle of law that before a broker is entitled to commissions claimed to have been earned under an agreement to pay them, it is necessary that all of the conditions precedent of the agreement, imposed upon the broker at the time of his employment, be performed.

Hall v. *Shiff*, 179 App. Div. 699;
Fuller v. *Bradley Constr. Co.*, 229 N. Y. 605;
Williams v. *Ashner*, 152 App. Div. 447.

Second, however, it is an equally basic principle that although a broker is bound by any condition imposed upon the payment of his commissions at the time of his employment, he is relieved of those conditions where nonperformance results from the principal's default.

Stern v. *Gepo Realty Corp.*, 289 N. Y. 274;
Goodman v. *Marcol, Inc.*, 261 N. Y. 188;
Amies v. *Wesnofske*, 255 N. Y. 156, 163;
Colvin v. *Post Mortgage and Land Co.*, 255 N. Y. 510, 517;
Tanenbaum v. *Boehm*, 202 N. Y. 293;
Davidson v. *Stocky*, 202 N. Y. 423;
Sibbald v. *Bethlehem Iron Co.*, 83 N. Y. 378.

In the *Sibbald* case which is a leading authority and persistently cited in the reports, the court stated, pages 383-4:

> "If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the con-

tract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions."

To determine which of the foregoing principles applies to the facts at Bar, we are relegated to the decision of the Federal question involved whether there was or was not a valid contract of sale by respondent to Lloyd Brasileiro, which was validly assigned to Moore-McCormack Lines, Inc., notwithstanding the absence of approval by the Maritime Commission.

The Shipping Act requires the approval of the Maritime Commission to the sale by a citizen of the United States of any vessel "to any person not a citizen of the United States" or to the "transfer or (placing) under foreign registry or flag" of any such vessel (Title 46 U. S. C. A., Sec. 808; 52 Stat. 964). No approval is required for the sale or transfer of a vessel by one citizen of the United States to another; nor is any approval required for the transfer of a vessel by an alien to an American citizen.

Respondent was desirous of selling a vessel. Lloyd Braileiro was anxious to purchase it. The identity of the particular purchaser was of no interest to respondent since the contract was by its terms assignable. But so long as the prospective purchaser was an alien—a foreign government—the consent of the Maritime Commission was a necessary incident in the completion of the transaction.

It seems to be evident that obtaining the approval of the Maritime Commission was not the purpose of the parties in contracting. The primary purpose was the sale and purchase of a vessel. The Commission's approval was a mere incident—an inevitable obstacle, to the extent and only to the extent that the law required such approval. Upon the assignment of the contract to a citizen the need

for approval vanished by express provision of the statute; and since the time for performance provided in the contract had not expired, respondent's obligation to carry out its bargain could not be satisfied by the plea that the non-essential approval was not forthcoming. From the time of the assignment, the Maritime Commission had no statutory authority to approve the sale to an American citizen. Performance of the condition then became impossible within the meaning of Section 301 of the Restatement of Contracts, which provides:

> "Impossibility that would discharge the duty to perform a promise excuses a condition if
>
> (a) a debt for performance rendered has already arisen and the condition relates only to the time when the debt is to be discharged, or
>
> (b) existence or occurrence of the condition is no material part of the exchange for the promisor's performance and the discharge of the promisor will operate as a forfeiture."

The performance of the condition was no material part of the consideration for the sale of the vessel. If anything it was a burden upon and a source of expense to the respondent. Respondent contracted to sell its vessel for the sum of $400,000, and that sum was tendered to it by the assignee of the purchaser, in cash or in any other form that respondent would prefer. Whatever motive induced respondent's change of mind to sell the "Spencer Kellogg" it certainly was not the absence of a purchaser ready, willing and able to buy on respondent's own terms. The Court will not find it difficult to surmise the motive if the scarcity of tankers which developed between October and December of 1940 is borne in mind.

With the general principle of law relied on by the Courts below, that parties cannot make a valid contract to do an act prohibited by statute (R. 75) we do not of

course disagree. The principle however has no application to the facts at Bar. The parties here did not agree to do anything proscribed by law. They expressly agreed to observe the law. Contracts to do acts requiring governmental consent are as valid as any other type of agreement, if no purpose to evade the statutory proscription is evident.

Professor Williston says (6 Williston on Contracts, Revised Edition, 5019, note 3):

> "The fact that a party bargains to do an act which will be illegal unless governmental permission is obtained does not make such bargain illegal, and if he does not obtain such permission he is responsible in damages for failure to perform."

This would seem to be the doctrine of the New York Court of Appeals in respect of State license regulations.

> *Zwirn* v. *Galento,* 288 N. Y. 428;
> *Raner* v. *Goldberg,* 244 N. Y. 438;
> *Shedlinsky* v. *Budweiser Brewing Co.,* 163 N. Y. 437.

The principle has not, however, been applied by that Court to the Federal statute here involved.

As stated in the petition for certiorari (*supra,* p. 12), we have been able to find only one Federal report, The Pilot, 42 Fed. (2d) 290, in which the principle involved in this case was considered and the decision of that case supports petitioner's contentions. The Court there expressly held that there was no violation of the Shipping Act notwithstanding that the agreement for sale was not expressly conditioned upon approval by the then Shipping Board, where the vessel was not actually delivered and did not leave American waters prior to obtaining the approval of the Board. The Court specifically stated at page 290:

> "I think the claimant clearly had an opportunity to get the Board's permission before the boat left American waters."

In the case at Bar, the burden of obtaining such permission or approval of the Maritime Commission was expressly placed on the respondent by the specific terms of the contract. Respondent was to exercise all diligence to obtain such approval—not approval by December 6, 1940, the date of the Commission's decision, but approval "on or before the date of delivery" (R. 19). Such approval was to be evidenced by a certified copy of the Commission's order to be delivered at the time of delivery of the vessel on December 16th, 1940 (R. 17). The respondent had already received a payment of $100,000 on account of the purchase price of the vessel. Is it to be assumed that such payment was intended to be a mere token of esteem and that the obligation of respondent was illusory and non-existent because it could, by its own refusal to act cause non-performance of the contract? Rehearing might have been applied for; a new application could have been filed. (Title 46 U. S. C. A., Section 824, 39 Stat. 736.) We do not contend that these steps should have been taken. They are pointed out to demonstrate that the Commission's action, ten days prior to the expiration of the time for delivery, was not the irrevocable death sentence of the contract under which respondent had undertaken to exert its best efforts to obtain approval "on or before the date of delivery". So long as the possibility of performance existed the contract could not be terminated by the unilateral action of the respondent. In our present political economy when governmental restraint and control so greatly pervade the sphere of business and commercial transactions, it is establishing a precedent of far reaching and dangerous consequences to hold that a party solemnly assuming an obligation to obtain governmental consent to the performance of an ordinary commercial contract can evade responsibility by

his own inaction and refusal to use the "all diligence" expressly undertaken (R. 19). So long as there remained a period of time before the final date for delivery during which efforts might have been made to obtain permission of the Maritime Commission, respondent's obligation to perform continued.

It may be profitable to consider the hypothetical case which would have existed if the Maritime Commission had approved the contract upon rehearing on December 7, 1940, the day after it denied approval.

To accept the position of the Courts below would be to hold that in such case the approval of the sale on rehearing would have been ineffectual to bind respondent to make delivery of the vessel notwithstanding that approval had been obtained before the time for performance specified in the contract had expired and that it was respondent's obligation to exercise "all diligence" to obtain such approval. The argument, followed to its logical conclusion, implies a limitation upon the statutory authority of the Maritime Commission to reconsider its orders and to amend, reverse or modify them. (Title 46 U. S. C., Section 824, 39 Stat. 736.)

The parties in contracting did not provide that the approval must needs be granted upon the specific form of application which was filed. On the contrary, they provided that the defendant was to exercise "all diligence" to obtain approval (R. 19). The parties did not provide that the contract was to terminate if the Maritime Commission preliminarily failed to approve the sale but changed its ruling later. They did not provide that approval was to be obtained on any specified date but that the defendant was to obtain the approval "on or before the date of delivery of the vessel" (R. 19) which was December 16, 1940. The contract did not provide that the seller's obligation to exercise "all diligence" to obtain the approval should terminate on December 6,

1940; it provided no limitation upon the seller's obligation to obtain such approval.

It is submitted that the contract between defendant and Lloyd Brasiliero was a valid and binding agreement; that the condition of obtaining approval of the Maritime Commission to the sale was in no sense a condition precedent to the existence of the contract; that it was at most an obligation of respondent which was performable at any time up to and including the date for delivery of the vessel and performance of which became unnecessary after its *raison d'etre* came to an end upon the assignment of the contract to Moore-McCormack Lines, Inc.

It must be remembered that this is not a case where respondent could not deliver because of some defect in its title or other obstacle rendering performance by it impossible. The purchaser, Moore-McCormack Lines, Inc., was actually ready, willing, able and anxious to take delivery of the vessel within the time for performance specified in the contract and actually tendered full payment of the contract price in cash. Respondent had the actual opportunity of completing the sale and receiving full payment under its contract. If respondent had not wilfully refused to perform its agreement of sale, every condition of the commission letter of September 3, 1940 would have been satisfied. The sale would have been effected, approval of the Maritime Commission was no longer necessary, full payment would have been made and title would have been transferred to Moore-McCormack Lines, Inc. If ever a broker had fully earned his commission and accomplished the job he was hired to do, plaintiff's assignor did so in this case. Respondent, however, having refused to perform for whatever reasons personal to itself it might have had, now attempts to shield itself behind the provisions of the Shipping Act and takes a position which we submit is both legally unsound and from a business viewpoint completely irresponsible; a position that can only be justified if this Court holds that under the provisions of the Shipping Act and similar statutes requir-

ing governmental consent, businessmen cannot make valid contracts to obtain such governmental consent. We submit there is no policy of public expedience requiring that such a construction be placed upon the Act. The purpose of the Act is to protect the public interest against transactions which might be detrimental. It was never intended to stultify commerce or to prevent businessmen from engaging in ordinary commercial transactions subject to the approval of Federal commissions where necessary. It seems to us that in a case such as the one at bar where the approval of a Federal commission has become unnecessary within the time fixed for performance by the contract, the contract must be performed by the contracting parties; and upon failure to perform they are not privileged to invoke the immunity given by the statute to protect the public interest against a wholly different transaction and situation.

Conclusion

It is respectfully submitted that the Court of Appeals by its judgments sought to be here reviewed has determined a Federal question of substance and of general importance which has not heretofore been decided by this Court or by any Appellate Federal Court. To the extent that it has been at all considered by a Federal District Court its determination was contrary to the determination of the Court of Appeals. The determination of the Federal question and only the determination of the Federal question will decide the issues between the parties litigant in this action. It is, therefore, respectfully prayed that the petition for writs of certiorari submitted herewith be granted so that this Court may review the judgments of the Court of Appeals of the State of New York in said petition referred to.

Respectfully submitted,

Sydney J. Schwartz and
Howard F. R. Mulligan,
Counsel for Petitioner.

APPENDIX

Opinion of Special Term

By STODDART, J.

Dated January 20, 1942

Motion for summary judgment. The plaintiff sues as the assignee of one George Ferguson, who, it is claimed, was employed by the defendant to effect the sale of a vessel to Lloyd Brasileiro, a Department of the Republic of Brazil. Ferguson's commission was to be paid "If and when the sale is effected, approval of the Martime Commission obtained, full payment is made to us and title transferred to your buyers, then you will be paid a commission of 5% of the purchase price. Otherwise there is no obligation on our part." Although none of these events precedent to Ferguson's right to compensation happened, it is claimed that it was the defendant's own wilful default which prevented their occurrence.

The papers reveal that on the 24th day of October, 1940, an agreement to sell the vessel was signed by the defendant. Delivery of the vessel was to be made on or before December 16th, 1940. However, it was provided by paragraph 10 of the agreement that "*This agreement and the sale* of the vessel are subject in all respects to the condition that the United States Maritime Commission shall approve the sale of the vessel to the Buyer and her transfer to Brazilian registry on or before the date of delivery of the vessel * * *. The Seller shall promptly apply for such approval by the United States Maritime Commission and use all diligence to obtain same. * * *" (Italics mine.)

After having been approved as to form by the prospective purchaser, a written application was submitted

by the defendant to the Maritime Commission on October 24, 1940. On December 6, 1940, the Commission denied the application. The defendant notified the purchaser of the disapproval and on December 9th returned the sum of $100,000 which had been delivered upon execution to the contract. On December 14th an assignment was made by the purchaser to the Moore-McCormack Lines Inc., which was ready, willing and able to comply with the terms of the contract on December 16th, the date of delivery of the vessel.

The defendant's argument on this motion is that there was no contract without the Commission's approval and if there was no contract that there could be no assignment. With this contention, I agree. By Section 808, Title 46, of the U. S. Code Annotated, it is provided, in part:

> "* * * it shall be unlawful without the approval of the United States Maritime Commission, to sell * * * or agree to sell * * * to any person not a citizen of the United States * * * any vessel * * * owned in whole or in part by a citizen of the United States * * *."

Violations, according to that Section, will result not alone in the forfeiture of the vessel but in punishment of the violator by the imposition of a fine of $5,000, imprisonment of not more than five years, or both.

The parties to the contemplated sale in this case apparently recognized Section 808 by conditioning their agreement upon the Commission's approval. Had they not done so, the agreement would have been void and unenforceable. Nevertheless, for it is well settled that a contract or sale directly prohibited by statute is void. (Sturm v. Truby, 245 App. Div. 357); Restatement of the Law of Contracts, Section 580; Williston on Contracts,

Revised Edition, Section 1763. But, having expressly agreed to the condition, the conclusion that the contract was ineffective is strengthened and reinforced, for a precedent condition must be performed or happen before a duty of performance arises or before the agreement of the parties in this case became a valid and binding contract. (See Williston on Contracts, Revised Edition, Section 666-A.) "Non-performance of a condition precedent must * * * annul the contract in toto * * * (Del Monte Dress Co., Inc. v. Royal Indemnity Co., 154 Misc. 751). After the defendant's application for approval was denied, it was under no obligation to apply again. It rightfully treated the contract as non-existent and returned the down payment. Ferguson, therefore, had not earned any commission.

Accordingly, the plaintiff's motion is denied. In the absence of a cross-motion, the court may not dismiss the complaint at this time. (Lang v. Dryer, 170 Misc. 207.)

Submit order on notice.

Dissenting Opinion of Mr. Justice (now Presiding Justice) Close of the Appellate Division

The contract was assigned prior to the law day to a purchaser to whom the condition precedent had no application.

Shipping Act (Title 46, U. S. C.)

Section 808. Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade.

* * * * * * * * * *

Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner, transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both. (As amended Ex. Ord. No. 6166, Section 12, June 10, 1933; June 29, 1936; c. 858, Sections 204, 904, 49 Stat. 1987, 2016; June 23, 1938, c. 600, section 42, 52 Stat. 964.)

Section 824. Reversal, suspension, or modification or orders. The board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order may by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order. (Sept. 7, 1916, c. 451, Section 25, 39 Stat. 736.)

(6)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 300 and 304.

ADOLF AXELRATH,

Petitioner,

—against—

SPENCER KELLOGG AND SONS, INC.,

Respondent.

BRIEF ON BEHALF OF SPENCER KELLOGG AND SONS, INC., IN OPPOSITION FOR PETITION FOR WRIT OF CERTIORARI.

CARVER W. WOLFE,
Attorney for Respondent, Spencer Kellogg and Sons, Inc.

J. NEWTON NASH,
Of Counsel.

COURT PRESS, 130 Cedar Street, N. Y. C.

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BRIEF ON BEHALF OF SPENCER KELLOGG AND SONS, INC., IN OPPOSITION FOR PETITION FOR WRIT OF CERTIORARI.

This petition for a writ of certiorari presents no real Federal question. The holding of the Courts below was not, as the petitioner states, that the agreement for the sale of the "Spencer Kellogg" was a nullity under the provisions of the Shipping Act and placed no obligation of performance upon the seller after a tender by a so-called assignee, but simply that the inability and failure to perform a condition precedent by obtaining the approval of the Maritime Commission of transfer of registry of the vessel, discharged the respondent of all further obligation under the contract, a determination predicated upon broad rules of general jurisprudence and not at all involving any title, right, privilege or immunity claimed by the respondent under the Federal Statute.

Section 9 of the Shipping Act of 1916, as amended by the Act of June 23rd, 1938 (Title 46, Section 808 U. S. C.) makes it unlawful "to sell" or "agree to sell" a vessel "to any person not a citizen of the

United States" without the approval of the United States Maritime Commission, and for this reason, the condition that the agreement was subject to approval of the Commission was inserted in paragraph "10" of the agreement (R. 19), and the letter of the respondent to petitioner's assignor, dated September 3rd, 1940, authorizing him to negotiate for the sale of the vessel, was subject to the same proviso (R. 14).

On October 24th, 1940, immediately after execution of the agreement of sale, respondent filed a verified application on the required Government form, which was also signed by the buyer, the Lloyd Brasileiro, with the United States Maritime Commission, requesting approval of the contract of sale and proposed transfer of registry of the "Spencer Kellogg" (R. 52-59). On December 6th, the Maritime Commission notified the respondent by telegram that its application had been denied (R. 60), and on the following day publicly announced its decision in one of its regular releases (R. 60).

In view of the obvious finality of the Commission's action, the defendant returned the payment made by the Lloyd Brasileiro on the signing of the contract by check enclosed in a letter dated December 9th (R. 61). Despite the denial of the application, the Lloyd Brasileiro's attorneys, apparently believing that their client, a Department of the Brazilian Government, might be able to persuade the Maritime Commission to reverse its ruling, returned the check to defendant's attorneys in a letter dated December 10th, stating that, as the agreement of sale provided the buyer should aid the seller in obtaining the Maritime Commission's approval, if requested, there would seem to be no objection to the Brazilian Government requesting the American Government to review the Maritime Commission's decision, and that such

request had been made (R. 62-63). But such request was without avail, as the Commission adhered to its ruling, and on December 13th the defendant again returned the initial payment to the Lloyd Brasileiro (R. 64).

At this point, a last minute effort was made to revive the transaction. On Monday, December 16th, Lloyd Brasileiro again returned the check to the respondent in a letter stating that on Saturday, December 14th, it had assigned the contract for the purchase of the "Spencer Kellogg" to Moore-McCormack Lines, Inc., a company that maintains extensive services in Brazil (R. 25). A letter to the same effect, dated the same day, was received by the respondent from Moore-McCormack Lines, Inc. (R. 26).

On December 17th respondent again returned the check to Lloyd Brasileiro, and this time it was accepted and deposited (R. 65-66). Thereafter, a number of letters were exchanged between the respondent and Moore-McCormack Lines, Inc., but Spencer Kellogg and Sons, Inc., continued to maintain that the contract was null and void and the assignment of no effect, and there the matter ended (R. 27-34). No claim has been asserted or action instituted by Lloyd Brasileiro or Moore-McCormack Lines, Inc., which clearly indicates that they have no confidence in their original position in the matter.

Some months later this petitioner, as assignee of Ferguson, brought suit to recover brokerage commissions, and, after respondent's answer was served, moved for summary judgment, pursuant to Rule 113 of the Rules of Civil Practice. This motion was denied (R. 73-75) and later, a cross-motion of the respondent for summary judgment was granted (R. 6-7). On appeal to the Appellate Division of the

Supreme Court, Second Department, the decision of the lower Court was affirmed, without opinion (R. 80), Mr. Justice Close dissenting (R. 81); and on May 28th, 1943, the decision of that Court was unanimously affirmed, without opinion, by the Court of Appeals of the State of New York (R. 83-84).

The validity of the Federal Statute was in no way involved. Nor was any title, right, privilege or immunity claimed by the respondent under the Statute in question. The New York Courts simply affirmed the well settled doctrines that a condition precedent is one which must happen before either party becomes bound by a contract, and that inability to perform the condition discharges all further obligation under the agreement.

POINT I.

Because there is no Federal question involved and the State Court decision rests upon an adequate non-Federal ground, the petition should be denied.

Where a right, title, privilege or immunity is claimed under a statute of the United States and the decision is either in favor of or against the title, right, privilege or immunity claimed, it must be specifically set up by the party claiming the revision in order to give the Supreme Court authority to revise it; it must also be a real and not a fictitious Federal question of a substantial nature; and it should appear that, though the Federal question was raised, the decision was not and could not have been made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the Federal question.

New Orleans v. *New Orleans Waterworks Co.*, 142 U. S. 87;
Hamblin v. *Western Land Co.*, 147 U. S. 531;
Columbia Water Power Co. v. *Columbia Electric Street R. Light & P. Co.*, 172 U. S. 475;
Abrams v. *Van Schaick*, 293 U. S. 188.

None of these requirements for review are present here. There is merely the bare averment that a Federal question is involved, presumably because the State Courts ruled that the respondent was discharged from any further contractual duty by reason of its inability to perform a condition precedent which incidentally involved a Federal Statute. This statement is wholly insufficient to sustain jurisdiction.

New Orleans v. *New Orleans Waterworks Co.*, *supra*;
Clarke v. *McDade*, 165 U. S. 168;
Mutual Life Ins. Co. v. *McGrew*, 188 U. S. 291;
Sawyer v. *Piper*, 189 U. S. 154;
Goodrich v. *Ferris*, 214 U. S. 71.

The Pilot, 42 Fed. (2d) 290, referred to in the petitioner's brief, has no bearing whatever on the issues in this case. That case, which arose before Section 9 of the Shipping Act of 1916 was amended by the Act of June 23rd, 1938 (Title 46, U. S. C., Sec. 808, 52 Stat. 964), so as to provide that it is also unlawful to "agree to sell" a vessel documented under the laws of the United States for transfer to foreign registry without approval of the Maritime Commission, involved a libel by the Government for forfeiture of the vessel for violation of the Statute

requiring approval of such sales. The Court held there were no grounds for forfeiture as the vessel had not been transferred when seized and, hence, no provision of the Statute had been violated. In the instant case, the New York Courts simply applied well-settled rules of general jurisprudence, which have no relation to the validity of the Statute or a privilege or immunity claimed thereunder.

POINT II.

The ruling of the New York State courts was based upon well settled principles of law and should not be disturbed.

Conditions precedent, such as the one contained in the agreement of sale in this case, are common. The rule of law applicable thereto is stated in the opinion of Justice Clifford in *Jones* v. *United States,* 96 U. S. 24, at page 28, as follows:

> "Conditions, says Story may be either precedent or subsequent, but a condition precedent is one which must happen before either party becomes bound by the contract. Thus, if a person agrees to purchase a cargo of a certain ship at sea provided the cargo proves to be of a particular quality, or provided the ship arrives before a certain time, or at a particular port, each proviso is a condition precedent to the performance of such contract; and unless the cargo proves to be of the stipulated quality or the ship arrives within the agreed time or at the specified port, no contract can possibly arise. *Story, Contr.* 33."

See also, *Williston on Contracts,* Revised Ed., Sec. 666-A.

Under this rule, the approval of the Maritime Commission had to be obtained before the parties became bound by the agreement. If, as Justice Stoddart stated in his opinion in the New York Supreme Court (R. 74), the agreement had not been made subject to such approval, it would have been void and unenforceable under the settled rule that a contract or sale directly prohibited by statute is wholly void.

Sturm v. *Truby*, 245 App. Div. 357;
Restatement of the Law of Contracts, Section 580;
Williston on Contracts, Revised Edition, Section 1763.

Though application to the Commission for approval of the sale and transfer of registry was duly made, it was not and could not be obtained. Since the condition precedent could not be fulfilled, the respondent was discharged of any further contractual duty under the agreement of sale, and the subsequent last minute assignment to Moore-McCormack Lines, Inc., was of no binding force and effect.

Del Monte Dress Co., Inc. v. *Royal Indemnity Co.*, 154 N. Y. Misc. 751;
Restatement of the Law of Contracts, Sec. 458.

As the condition that approval of the sale by the Maritime Commission be obtained, set forth in the letter addressed to Ferguson authorizing him to negotiate the sale of the vessel, could not be performed, no commissions were earned, and the petitioner is entitled to no recovery.

The doctrine of the New York Court of Appeals cases relied upon by the petitioner that contracts, which might be performed lawfully even though state and local licenses for particular uses or purposes could not or had not been obtained, may be enforced, is not applicable to the facts of this case.

Raner v. *Goldberg,* 244 N. Y. 438, and *Shedlinsky* v. *Budweiser Brewing Co.,* 163 N. Y. 437, involved leases of property, the former to run a dance hall and the latter a saloon, the operation of which necessitated obtaining local licenses, which were denied. In neither of the cases, however, did the lessee guard against the possible failure to obtain these licenses in the contract. The Court held that the contracts were not in themselves unlawful, that the lessees were bound, and that the use of the premises in the manner contemplated by the lease was only unlawful because the contingency that the license might not be granted had arisen.

In *Zwirn* v. *Galento,* 288 N. Y. 428, Galento was required to pay Jacobs' administrator the percentage of earnings on an exhibition arranged in New Jersey pursuant to a contract contemplating a series of exhibitions, because the condition that the agreement be approved by the New York State Boxing Commission could not possibly have any application to an exhibition held in New Jersey where the contract was lawful and could be performed even though no license from the New York authorities had been obtained.

Under the law applicable to the instant case, the condition precedent must occur before either party was bound, performance was entirely dependent upon

approval of the Maritime Commission and the contract, without the condition, would have violated a Federal statute and been unlawful *per se*.

CONCLUSION.

It is respectfully submitted that the application for certiorari should be denied.

Respectfully submitted,

CARVER W. WOLFE,
Attorney for Respondent, Spencer Kellogg and Sons, Inc.

J. NEWTON NASH,
Of Counsel.

IN THE

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SYDNEY J. SCHWARTZ,
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Counsel for Petitioner.

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SPENCER KELLOGG AND SONS, INC.,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

This reply brief is submitted to point out a basic misconception of fact contained in respondent's brief and to indicate the inapplicability of the authorities relied on by respondent.

Replying to Respondent's Statement of Facts

At page 2 of respondent's brief, reference is made to what is characterized as "the obvious finality of the Commissions' action" in denying approval of the sale by respondent to Lloyd Brasileiro and at page 3 the statement is made "that such request was without avail, as the Commission adhered to its ruling." The record does not support the suggestion of respondent that the Commission's ruling was final or that the Commission upon reconsid-

eration adhered to its ruling. The statements contained in respondent's brief are coupled with record references justifying the drawing of no inferences approximating the conclusions referred to. Page 61 of the record, which is cited as authority for the conclusion of "obvious finality of the Commission's action" is nothing more than a letter dated December 9, 1940, whereby respondent informed Lloyd Brasileiro of the receipt of a telegram from the Maritime Commission dated December 6, 1940, advising respondent of the denial of the application for approval of the sale, notified Lloyd Brasileiro "that said contract is hereby cancelled" and returned a check for the $100,000 down payment. The statement that the Commission "adhered to its ruling" is supported by the citation of R. 64 which is nothing more or less than respondent's letter to Lloyd Brasileiro dated December 13, 1940 again forwarding the check for $100,000 which had been rejected by Lloyd Brasileiro and returned to respondent and notifying Lloyd Brasileiro of respondent's cancellation of the contract. This letter contains the phrase "In view of the fact that we have had no further notification from the Maritime Commission of any change in their decision, we must be guided by their official denial of the application for transfer and therefore notify you again that the contract has been cancelled." The fact is that no application for rehearing was made to the Commission and the record is devoid of any evidence that the application for approval was ever resubmitted to the Commission or that any request for rehearing was ever presented. Lloyd Brasileiro wished to make further efforts to obtain the approval of the Commission as indicated in a letter of December 10, 1940 sent by its counsel to counsel for the respondent (R. 62) but respondent rejected any suggestion of further effort to obtain the Commission's approval and reiterated its "cancellation" of the contract (R. 64).

It is manifest from the record, therefore, that the Commission's action was not final, that it "adhered" to no prior ruling and that respondent in violation of the express terms of its agreement to exercise "all diligence" to obtain the Commission's approval (R. 19) actually hindered and obstructed any effort to obtain approval after December 6, 1940.

Before proceeding to discussion of respondent's Points of Law, we wish to point out that the statement at page 3 of respondent's brief "no claim has been asserted or action instituted by Lloyd Brasileiro or Moore-McCormick Lines, Inc., which clearly indicates that they have no confidence in their original position in the matter" is not only made without citation to any part of the record to justify the statement but is actually contrary to what the record shows. On December 19, 1940, Moore-McCormick Lines, Inc., wrote to respondent and demanded arbitration under the contract pursuant to its terms (R. 28-29). On December 19, 1940, respondent refused arbitration (R. 30) and on the 24th Moore-McCormick Lines wrote respondent (R. 31).

> "Your repudiation of the arbitration clause of your contract has given us a shock, not because ways of enforcement of that clause and of the contract itself are unavailable to us but because a company of high standing in the shipping world has bluntly taken such a stand."

Respondent nonetheless adhered to its arbitrary position (R. 32-33) and ignored a further request for arbitration made by letter dated January 13, 1941 (R. 34). Beyond all else, we think it quite obvious that any action or inaction on the part of Moore-McCormick Lines, Inc., can hardly have any bearing upon petitioner's rights in this case nor even be properly the subject of comment.

Replying to Respondent's "Point I"

The cases decided by this Court which are cited in Respondent's Point One are merely decisions enunciating the well-settled rules of jurisdiction of this Court to review Federal questions decided by State Courts of last resort. None of the decisions has the slightest analogy to the facts at bar either in detail or in principle. What respondent has significantly failed to do is to point out any respect in which petitioner has failed to bring himself directly within the statutory authority of this Court to review the judgments below nor has respondent in any respect whatever answered petitioner's specifications of jurisdiction or the reasons relied on for allowance of the Writs set forth in the petition for certiorari.

In the case at bar, the Shipping Act was specifically pleaded as a defense by respondent in its answer (R. 41-2) and the Courts below decided the case upon the express authority of the Federal statute (R. 74). It would be difficult to conceive of a decision by a State Court more clearly deciding a Federal question of a substantial nature than the decision of the Courts below in the case at bar. That the question is of paramount importance is unchallenged. That it has never been decided by this Court or any authoritative federal tribunal is undenied.

Replying to Respondent's "Point II"

Respondent, in its second point, has attempted to argue that the decision of the Courts below was based upon "well-settled principles of law" and, therefore, should not be disturbed. Aside from respondent's conclusion to that effect, no principles of state law are set forth under which this case could have been decided without deciding the Federal question involved. The authorities cited at page 7 of respondent's brief (cited also in the opinion be-

low, R. 75), rely expressly upon the construction of the Federal statute rendering the contract between respondent and Lloyd Brasileiro void. Respondent concedes that the condition of approval by the Maritime Commission was incorporated in the contract only because of the provisions of the Shipping Act (Respondent's brief, pp. 1-2). This concession coincides with petitioner's position that approval by the Commission was no essential part of the contract and that it was at most a burden upon respondent which respondent was obligated to perform at any time prior to the date for delivery and of which respondent was relieved from performance when the contract was assigned to Moore-McCormick Lines, Inc. The citation of the decision of this Court in *Jones* v. *United States,* 96 U. S. 24 (Rspts. Br., p. 6), merely emphasizes the validity of petitioner's argument. In that case the Court not only held that a condition precedent must be performed where it is a true condition precedent, but the Court further held that hindrance or refusal to perform by the promisee is equivalent to performance of the condition. At page 27 of the opinion the Court stated:

> "Hindrance or refusal by the other side is equivalent to performance of condition. For, where the right to demand the performance of a certain act depends on the execution by the promisee of a condition precedent or prior act, it is clear that the readiness and offer of the latter to fulfill the condition, and the hindrance of its performance by the promisor, are in law equivalent to the completion of the condition precedent, and will render the promisor liable upon his contract."

and at page 28 of the opinion just prior to the quotation at page 6 of respondent's brief, the Court indicated that it is only dependent conditions which are "of the essence of the contract" that make performance of the prior condition mandatory. In the case at bar obtaining approval of the Maritime Commission was an obligation

of performance assumed by respondent. It was not intended to be a convenient method of evasion of respondent's undertaking to sell the vessel. The condition was in no sense of the essence of the contract; it was merely the parties' recognition and acknowledgment of the statutory limitations placed upon them by the Shipping Act. The Courts below have given the Shipping Act a construction which makes the contract and in principle, all contracts requiring the consent of Federal commissions, absolutely void, and, in effect, hold that no commercial agreement can be entered into to obtain the approval of a Federal commission notwithstanding that no unlawful purpose is intended and that no violation of any Federal statute is contemplated. We think it clear that this case presents a Federal question of great importance not heretofore decided by this Court, which has been decided by the Courts below in a manner tending greatly to restrict freedom of contract in large fields of interstate and foreign commerce.

Conclusion

It is respectfully submitted that the judgments of the Court of Appeals should be reviewed by this Court and that the prayer of the petition for certiorari should be granted.

Respectfully submitted

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